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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 66

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR,
Petitioner,

v.

THE UNITED STATES OF AMERICA EX REL. THE VINDICATOR CONSOLIDATED GOLD MINING COMPANY, A CORPORATION, *Respondent.*

REPLY TO PETITION FOR WRIT OF CERTIORARI.

EDGAR WATKINS,
and J. C. TRIMBLE,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Statement of the Case	1
Jurisdiction	3
Reasons Urged by Petitioner for Granting Writ	3
Reply to Brief in Support of Petition	5
Questions Presented	5
Argument	5
Appendix	9
Act Oct. 5, 1918	9
Legislative Discussion	11
Congress Condemned Secretary's Construction	17
Act June 7, 1924	19

TABLE OF CASES.

Allen v. Smith, 173 U. S. 389	6
Bakelite Corp., 279 U. S. 438	3
Fed. Radio Com. vs. General Elec. Co., 281 U. S. 464, 469	3
Massachusetts vs. Mellon, 262 U. S. 447	3
Texas vs. Interstate Commerce Commission, 258 U. S. 158	3
United States v. Realty Co., 163 U. S. 427	6
Work vs. Chestatee Corp., 267 U. S. 185	4
Work vs. Rives, 267 U. S. 175	1, 3

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Petitioner,

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THE UNITED STATES OF AMERICA EX REL. THE VINDICATOR CONSOLIDATED GOLD MINING COMPANY, A CORPORATION, *Respondent.*

REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF THEREON.

Statement of the Case.

Petitioner's statement of the case contains some argument and is, we submit, not adequate or fully accurate.

At page 2 of the petition Work vs. Rives, 267 U. S. 175, is cited as holding "The action of the Secretary of the Interior in disallowing a similar claim was upheld by this Court." What this Court did was to

say that as the law stood when that decision was rendered the Secretary was vested "with power to reject all losses except as he was satisfied that they were just and equitable and it made his decision conclusive and final", and further this Court held that under the statute then in force a review of the Secretary's decision "was expressely forbidden". As we shall later show such review is now expressly authorized.

The Act of October 5, 1918, which we deem pertinent is not referred to in this petition. For relevant provision see Appendix *post* 9.

At page 4 of the petition certain general references are made to the answer filed by petitioner in the trial court and it is said that

> "the Secretary of the Interior the petitioner, following similar action by his predecessors, had determined that no allowance should be made for expenditures in purchasing property to which title was retained, and that respondent's claim had, therefore, been disallowed."

Nowhere does it appear that the Secretary or any of his predecessors denied this or any other claim because "title was retained.",

This record shows:

> "Deductions:
> Property.....$16,259.00 (Tr. 12)
>
> "I have no doubt whatsoever that the former Commission was right in holding this to be purchase of property and not an allowable item.
> The claim should be denied.
>
> (Signed) IRA E. ROBINSON,
> *Commissioner.*"

(Tr. 15).

"In the light of the foregoing it is abundantly clear that the expenditure in question was made to obtain a transfer of property and mining rights. Such expenditures are not reimbursable under the law, and no further award will be made.

(signed) E. C. FINNEY,
Acting Secretary."

(Tr. 18).

"It is clear beyond question that the expenditure aforesaid represents the purchase price of the mine." (Tr. 18).

General allegations in petitioner's answer can not destroy the effect of admissions in exhibits thereto.

Jurisdiction.

In Federal Radio Commissioner vs. General Electric Company, 281 U. S. 464, 469, this Court said:

"It (this Court) cannot give decisions which are merely advisory nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative."

Similar decisions are:

Massachusetts v. Mellon, 262 U. S. 447;
Texas v. Interstate Commerce Commission, 258 U. S. 158, 162;
Ex Parte Bakelite Corporation, 279 U. S. 438, at 454, note 14.

Reasons Urged by Petitioner for Granting the Writ.

Petitioner (Petition, p. 6, *seq.*) claims that the decision of the Court of Appeals of the District "is in

conflict with the decisions of this Court" in Work vs. Rives, 267 U. S. 175, and Work vs. Chestatee Corporation, 267 U. S. 185. The decision of this Court relied on were based on the ruling that the Secretary had full and final discretion. That full and final discretion has been taken away by the Act of February 13, 1929, so far as the legal issue here presented is involved. (See Act in Petition 27, 28.)

The Act of February 13, 1929, gives the right of review of "any question of law which has arisen or may hereafter arise." Petitioner by his answer raised a "question of law". On this point the issue is stated by the Court of Appeals as it was shown in petitioner's answer in the trial court. It was said:

> "The answer also states:
>
> 'It is admitted herein that money was paid by relator in the purchase of property, and if the court holds that losses were sustained thereby and are allowable in cases where claimant retains title, the amount thereof will be subsequently determined by the Secretary of the Interior.'
>
> It is apparent, therefore, that the denial of the allegation that the amount paid by the petitioner for the property constituted a net loss, coupled with the explanation, raises an issue of law, not of fact. That is, the Secretary, without examining the facts, held as matter of law that no loss could be suffered, within the meaning of the act, by one who had bought property and still retained title thereto. That is the sole question presented for our consideration, and the pleadings were obviously drawn for the purpose of raising it squarely and obtaining a decision thereon."

It is submitted that the former purpose of the Secretary having the object of "obtaining a decision" on this legal question cannot now be withdrawn and that such a decision would, as stated by the Court of Appeals, leave open to the Secretary the issue, "whether a net loss in the present case has or has not been suffered". (Tr. 35) This quotation from the opinion below completely answers the claim of petitioner (Pet. 8) that no power is left in the Secretary to determine whether or not a particular amount claimed for "allowance is just and equitable". If title is retained and the property has value, "the amount claimed for property would be reduced by reductions for salvage." While the quotation just given is not of record, petitioner uses it and therefore cannot object to our use thereof.

Reply to Brief in Support of Petition.

The citation to the opinions in the Courts below are correctly given and as to jurisdiction we have already referred to certain decisions.

Questions Presented.

The only question presented is:

Is the Secretary required in adjusting, liquidating and paying net losses to pay such losses as were actually sustained in the purchase of real estate?

Argument.

That respondent is entitled to its proper net losses is conceded. It expended money for property. This property has been lost as found by the Secretary who deducted the amount thereof from total losses.

The statute says expenditures made "for or upon property". The Secretary in effect struck from the statute the word "for". That respondent's property is so valueless that it could not be sold, makes immaterial here the fact of retention of title. "For" is not ambiguous. To say: "I gave $16,000. for a tract of land" conveys a certain meaning. This meaning is confirmed by the fourth proviso of the statute which reads:

> "That no claims shall be paid unless it shall appear to the satisfaction of said Secretary that *moneys were invested* or obligations were incurred subsequent to April 6, 1917, and prior to November 12, 1918, in a legitimate attempt to produce * * * chrome * * * for the prosecution of the war * * *. (Emphasis ours)."

Petitioner cites United States vs. Realty Company, 163 U. S. 427, 439, and Allen vs. Smith, 173 U. S. 389, 402. The answer to those cases, if any be necessary, is that the Act of October 5th, 1918 (*Post* 9) gave the right to just compensation for which the Act of March 2, 1919, gave one remedy. In the second case cited which but followed the first case, it was held that the law there, and that is true here, was passed "in recognition of a moral obligation" and was not "a gift by the government".

As the statute here for construction is unambiguous, legislative history and administrative construction are alike irrelevant. Petitioner, however, in brief seeks support from both. If such irrelevant matters are looked to, it will be found that they but confirm the meaning given by the Court of Appeals to the language of the statute.

Opportunity is given the Court were such desirable or necessary in our Appendix hereto to follow legislative history and administrative construction. It is there shown:

During the Great War certain minerals could not be imported and it became necessary for the United States to stimulate their production, "to provide further for the national security and defense" and the Act of October 5th, 1918, was passed (*Post* 9). That Act provided for "just compensation" and appropriated $50,000,000. The Act became a law too near to the Armistice to be used and was supplemented by the Act of March 2, 1919 (The applicable section of the 1919 Act is quoted on page 23 of the petition here.) That the Act of 1919 was supplemental to the Act of 1918 appears from the title to the bill introduced in the Senate (*Post* 11). The Act of March 2, 1919, reduced this appropriation from $50,000,000. to $8,500,000. By H. J. 170 and the report of the Committee on Mines and Mining, dated March 25, 1920, the Commission appointed by the Secretary was severely criticized. (*Post* 17) Thereafter, the Supreme Court and the Court of Appeals held that net losses for purchase of property were properly allowable and on February 18, 1924, the Secretary wrote to the Chairman of the Committee on Mines and Mining of the Senate that more money would be needed as a result of such decisions. (See Calendar No. 306, 68th Congress, 1st Session, Report No. 292 and *Post* 19.) It may be noted parenthetically that the letter from the Solicitor of the Department of the Interior, dated April 29, 1931, and copied in the Petition herein at page 10, contains the same figures of estimated claims used by the Secretary in 1924.

When the Secretary appealed for more appropriations, the Congress on June 7, 1924, struck the limitation of $8,500,000, leaving the original appropriation of $50,000,000. (*Post* 19) Thus did the Congress evidence its intention to have payments made for net losses "for" "property". After this Court held that no court could review the action of the Secretary, the Congress again showed that it meant the Secretary to make an award for "net losses" suffered "for" purchase of property, and the Act of February 13, 1929, was passed. (See Act petition herein pp. 27, 28.)

Of course, the Congress did not do the unusual and dangerous act of making a limitation on its statute by specifying "purchase of property" or any other item of net loss. The broad language covered all net losses and if one or a few items had been stated, all others would have been excluded. So, Congress as always, except in private claim bills, spoke in general terms.

Agreeing that the petition herein may be presented at the first opportunity, it is respectfully submitted that the writ of certiorari should be denied.

May .., 1931.

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Counsel for Respondent.

Appendix

LEGISLATIVE HISTORY.

General Statement.

A state of war having been declared between the United States and the government of Germany on the 6th day of April, 1917, importations of certain minerals from other countries were shut off and it became necessary that we produce in this country all such minerals. The question was discussed elaborately in the Congress, the discussion resulting in the passage of a bill approved October 5, 1918.

Act October 5, 1918.

"An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply."

The Act is printed 40 Stat. 1009, and following. In section 1 thereof it is stated:

"By reason of the existence of a state of war, it is essential to the national security and defense, and to the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to provide for an adequate and increased supply, to facilitate the production, and to provide for an equitable, economical, and better distribution of the following-named mineral substances and ores, minerals, intermediate metalurgical products, metals, alloys, and chemical compounds thereof, to-wit: * * * chromium * * * as the President may, from time to time,

> determine to be necessary for the purposes aforesaid, and as to which there is at the time of such determination, a present or prospective inadequacy of supply. The aforesaid substances mentioned in any such determination are hereinafter referred to as necessaries."

Section 2 authorized the President to purchase such necessaries and to enter into contracts for the production thereof. The section further makes certain provisions for the price, which shall be at a price not "less than the purchase or cost of production thereof."

Section 3 authorized the President to take over mines producing the named minerals, and provided:

> "The United States shall make just compensation, determined by the President, for the taking over, use, occupation or operation by the Government of any such necessaries or any such land, deposit, mine, smelter, or plant, or part thereof."

This section also provided that if the just compensation to which the owner was entitled could not be agreed upon with the President, suit therefor or for a part thereof was authorized.

Sections 4 and 5 relate to administrative matters not material here.

Section 6 appropriates the sum of $50,000,000 to "be used as a revolving fund for carrying out the objects of this Act, and for the purpose of making all payments and disbursements, including just compensation under section three."

Sections 7, 8, and 9 refer to administrative acts and are not material here.

Section 10 provides for a determination of the operative force of the Act, which shall be upon the proclamation of peace by the President.

Sections 11 and 12 are not material to the issue here.

This Act having been approved so near to the date of the Armistice, it was not enforced by the Secretary of the Interior, the Honorable Franklin K. Lane.

Legislative Discussion Preceding Passage of Act March 2, 1919.

As it would have been an unnecessary loss to enforce the Act of October 5, 1918, after the war was ended, the question was presented to the Congress of how to give "just compensation" to those persons who at the request of certain named agencies of the government had in effect surrendered their properties to the government. After hearings, and on the 15th day of December, 1918, Senator Henderson introduced a bill entitled,

> "A Bill to supplement an Act of Congress approved October fifth, nineteen hundred and eighteen (public numbered two hundred and twenty), and to authorize the Secretary of the Interior from the funds appropriated by said Act to determine, adjust, and pay losses sustained by investments preparatory to production of war minerals mentioned in said Act."

This was called Senate 5234. In the House of Representatives House Bill 13274 was introduced by Congressman Dent December 7, 1918. On January 28, 1919, Congressional Record, p. 2310, Senator Smoot, in a running debate, said:

"I will ask the Senator (meaning Senator Henderson) if it would not be very much better to strike out the words 'or acquiring property for producing'?".

To this Senator Henderson answered:

"I will consent to that, Mr. President."

On the next day, the debate continuing, Senator Henderson expressed the view that he would accept amendments "in order that we may get to conference with it."

The House having passed a bill, and the Senate having passed its bill, the matter came up for conference.

The bill pending to which Senator Smoot made reference was not the bill passed. In the bill that was subsequently passed the words "or acquiring property" were not continued, but more appropriate words were used, to wit: "for" and "investment," and in order to meet the objection of Senator Smoot *speculative profits were prohibited.*

Bill H. R. 13274, being subsequently passed by the Senate with Senator Henderson's amendment, was sent to conference and the conferees being unable to agree four times, so reported to their respective Houses. The Committee of Mines and Mining of the House of Representatives, after such disagreements, met and reported to the House an amendment offered as an amendment to the Henderson amendment. This was debated at length and finally the House voted instructing its conferees to offer in the conference this committee amendment to the Henderson amendment. This was done and the Senate conferees ac-

cepted the action of the House and so reported to their respective bodies. The conference report being accepted, the bill was passed and approved March 2, 1919 (Public No. 322, 65th Congress).

Congressman Wingo, a member of the Committee on Mines and Mining, called attention, pages 4265 and following, to the differences between the minerals amendment drawn by his committee as a substitute for the Henderson amendment and showed that it was an entirely different bill.

The Secretary of the Interior, after the passage of the Act of March 2, 1919, appointed a commission to administer that Act. This commission was so niggardly in its allowances to claimants and so narrow in its construction of the statute that claimants under the Act brought the matter to the attention of the Congress. The House Committee on Mines and Mining had hearings which are printed under the title "Hearings Before the Committee on Mines and Mining on H. J. Res. 170." The hearings were begun October 22, 1919, and the report contains 594 printed pages.

In the course of the hearings the opinion of the Attorney General in which the statement of Senator Smoot was quoted, came up for discussion. Congressman Wingo, who was a member of the Committee on Mines and Mining at the time of the discussion and when the Act of March 2, 1919, was passed discussed the opinion of the Attorney General, referred to the statements of Senator Smoot, and gave a history of what actually occurred. On page 555 of the Committee's report, referred to above, Mr. Wingo said:

> "Senator Smoot, if he had adhered to his original position, would have been against the

conference report; he would have been against everything, but Senator Smoot is a very practical man; after he made this short two or three-minute speech in the Senate he got to investigating the question. It is a matter of common knowledge that the claimants showed him the error of his position by private conversation; it is a matter of common knowledge that the claimants went around here and explained to members of Congress, and explained it to Senators. So Senator Smoot afterwards found that there was a just and proper demand. Now let me show you—I will read you from the very utterances that he made at the time he objected to this language. It will show you that he is objecting to the very thing that the war minerals relief bill does. On January 28, 1919, page 2311 of the Congressional Record, he says:

> "'I want to call the attention of the Senator from Nevada to the words "or acquiring property for producing." It seems to me that is going too far. I think that where a man has purchased a piece of property for producing these metals, we should not authorize the Secretary of the Treasury to go into the question as to what he paid and whether he lost upon the purchase price of that property because of the fact that the war closed sooner than he anticipated. I believe that is going altogether too far'."

Continuing the discussion, at page 556, he said:

> "Mr. Smoot said that that would be going too far because he suffered loss by reason of the war stopping sooner than he thought that it would. Now, what was the whole gist of the war minerals bill? It was to protect the man that we were going to get to produce these minerals, against that very loss by the sudden

page of the war, by authorizing contracts for two years. It was even debated upon the floor that one day before the war stopped, under the original $50,000,000 bill, a contract might be made for two years, so that there would be the Government operating and paying, if necessary, money and purchasing ore for one year and 364 days after the war stopped because the day before the war stopped, under that bill, a two-year contract would be made by the Government. Now that was the very object of the $50,000,000 bill. Senator Smoot says here that he is opposed to that object, but subsequently he sees the error of that position. As a practical man he has gone into the fact, and he sees it, so subsequently what does he do? He agrees to a conference report that not only is broader than the original thing that he objected to, but specifically says that you may consider losses that were occasioned by expenditures either 'for or upon.' Can you conceive of any stronger language? I would say: 'You are my agent. I am going to give you written authority to go out and I am going to back you up and authorize you to make expenditures for or upon property.' Now, I come along later and I say: 'Yes; you went and put up an office in New York City. I can stand that, but when you went out and spent the money to do the main thing that I wanted you to do, to get hold of the ore by purchasing the legal record title, or getting a lease on it—no; I can't stand that. I repudiate that. You didn't have any such authority from me.' Such a suggestion and such an interpretation is repulsive to every legal mind."

And concluding the discussion, at page 557, he said:

"I was frank in stating that we had liberalized the proposition by simply putting on the broad proposition that the Secretary of the Interior

should be authorized to do equity, and that we would only throw certain broad restrictions around him, and that inasmuch as we were going to do equity, I myself, in order that there might be a protection to the Government against that wide-open liberal provision, thought that we should have a provision in there that would authorize the Government to sue in case of a fraudulent claim put over by such an interpretation."

Having, at page 558, been asked a question as follows:

> "Why was the provision put in that no claim would be paid for land purchased for purely speculative purposes? What did you mean by that if you didn't intend in the original act to allow for property legitimately purchased?"

He answered as follows:

> "The inverse of a proposition is always stated by the direct statement of it. In other words, if I say that you shall not stay in the room, that is another way of saying that you shall get out of the room, and if I say that you shall not allow for speculative investments, that is an affirmative declaration that you may allow for investments not speculative. It doesn't take a lawyer to see that."

This history shows not only that the doubt stated by the Attorney General referred to another statute, but that Senator Smoot later understood the situation and agreed to language equally as broad, and, we believe, broader, than the original language to which he objected, and that the whole was protected by the provision against speculative investments.

The Act of March 2, 1919, was passed and approved, and Section 5 is quoted in the petition herein.

Congress Condemned the Action of the Commission Appointed by the Secretary of the Interior.

Reference has been made above to the hearings entitled H. J. Res. 170. After those hearings were completed, and on March 25, 1920, Mr. Garland, from the Committee on Mines and Mining, submitted to the Congress the report on the amendment to the War Minerals Act. This report criticised severely the former commission for its illiberal treatment of claimants, and said:

Findings of Committee.

> "The Committee is of the opinion that the Commission erred in its interpretation of the legislative intent. Its interpretation and application of the provisions of the Act and the application of the provisions of the law to the facts."

The report further declared that if the language of the Act was interpreted as the courts of the country interpret such legislation, "*just and equitable*" settlements could be had of every legitimate claim.

Following this the report cited the cases requiring a liberal construction of this remedial statute.

One result of this investigation and report was the Act of November 23, 1921, 42 Stat. 322, which is material only as showing that the Congress liberalized the law.

After the passage of the Act of November 23, 1921, relator and others claiming losses because of the

purchase of property, believing that the Congress had indicated an intention for more liberal terms, again appealed for an allowance to the Secretary of the Interior. Later this was again denied and in order to test the question, Logan Rives filed in the Supreme Court of the District of Columbia, in 1923, a petition for a writ of mandamus. This court held that the writ should issue and that purchase of property items were allowable. An appeal was taken to the Court of Appeals of the District of Columbia and on January 7, 1924, the Court of Appeals sustained this court, holding that relator Rives, similarly situated to the respondent here, was entitled to have the writ issue and to be paid an allowance for his losses for purchase of property.

While this decision stood, and on February 18, 1924, but little more than a month after the decision of the Court of Appeals, the Secretary of the Interior sent a communication to the Chairman of the appropriate Committees of the House and Senate with reference to pending legislation. In this communication the Secretary discussed the decision of the Supreme Court of the District of Columbia in the Rives case and then proceeded to show that of the $8,500,000 originally appropriated and allowed for claims that would be awarded for items other than the purchase of property and interest on borrowed money, there would remain only the sum of $389,337.38, to meet:

(a) $3,062,867.50 claimed for losses on purchase of property;
(b) $206,320.30 for interest price on borrowed capital;
(c) $453,608.54 for purchase of mineral rights.

The Secretary concluded his statement by saying:

> "This communication is being sent to the chairmen of the Appropriation Committees of the Senate and House and to the Chairmen of the Mines and Mining Committees of both branches of Congress.
>
> "Will you not confer and give me a reply at your earliest convenience?
>
> "Very truly yours,
>
> (Signed) "HUBERT WORK."

For complete letter and report of the Committee, see Calendar No. 306, 68th Cong. 1st Sess. report No. 292, dated March 18, 1924.

Act of June 7, 1924.

The Supreme Court of the District of Columbia and the Court of Appeals of the District having decided that purchase of property was an allowable item, the Secretary of the Interior, Mr. Work, having notified Congress that the appropriation was inadequate if such items and the item of interest on borrowed money were allowed, the Congress, on June 7, 1924, struck the limitation of $8,500,000.00 from the Act, and left in force the original appropriation of $50,000,000.00.

While it is true that this Court held that the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia had no jurisdiction and therefore reversed such courts, the fact that Congress, with a knowledge that if the decisions of the District courts stood more money would need to be appropriated, made such an addi-

tional appropriation shows that Congress acquiesced in the decisions of the District Supreme Court and of the Court of Appeals.